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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11
12 Robert M. Nelson, William Bruce) CASE NO. CV-07-05669 ODW (VBKX)
Banerdt, Julia Bell, Josette Bellan,)
13 Dennis V. Byrnes, George Carlisle, Kent) The Hon. Otis D. Wright II
Robert Crossin, Larry R. D'Addario,)
14 Riley M. Duren, Peter R. Eisenhardt,) CALIFORNIA INSTITUTE OF
Susan D.J. Foster, Matthew P.) TECHNOLOGY'S OPPOSITION TO
15 Golombek, Varoujan Gorjian, Zareh) PLAINTIFFS' MOTION FOR
Gorjian, Robert J. Haw, James Kulleck,) PRELIMINARY INJUNCTION
16 Sharon L. Laubach, Christian A.)
Lindensmith, Amanda Mainzer, Scott) Hearing Date: October 1, 2007
17 Maxwell, Timothy P. McElrath, Susan) Time: 4:00 pm
Paradise, Konstantin Penanen, Celeste M.) Courtroom: 11
18 Satter, Peter M.B. Shames, Amy Snyder)
Hale, William John Walker and Paul R.)
19 Weissman,)

20 Plaintiffs,

21 vs.

22 National Aeronautics and Space)
Administration, an Agency of the United)
23 States; Michael Griffin, Director of)
NASA, in his official capacity only;)
24 Department of Commerce; Carlos M.)
Gutierrez, Secretary of Commerce, in his)
25 official capacity only; California Institute)
of Technology; and Does 1-100,)

26 Defendants.
27
28

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INTRODUCTION

1
2 Plaintiffs are indeed well-respected and valued government contractors who
3 support very important public projects involving the United States' missions to outer-
4 space, while working on the federal government's property located at the Jet
5 Propulsion Laboratory ("JPL"). Caltech respects and values the contributions its
6 employees have made to the United States while working at JPL. Caltech hopes that
7 after Plaintiffs have dispassionately reviewed the specifics of the proposed
8 background checks as detailed in Caltech's brief and NASA's brief, Plaintiffs will file
9 for the federal identification badge necessary to have unescorted access to a federally-
10 owned property.

11 Given the nature of the work carried out for the government at JPL, however, it
12 is not unreasonable for the government to require some degree of assurance that
13 individuals with uncontrolled access to its facility are not a threat. In this case, the
14 federal government is asking Plaintiffs to provide their employment and educational
15 history, to disclose whether they have used illegal drugs in the last year, and to self-
16 select three references to attest to the fact that they are not a threat to others at JPL or
17 to the United States. Contrary to Plaintiffs' hypothetical concerns, the references are
18 not asked to disclose sensitive personal information.

19 Moreover, Plaintiffs have already voluntarily disclosed much of the information
20 requested by the government when they first applied for a job at JPL. Seven of the
21 plaintiffs also voluntarily disclosed much more detailed, potentially sensitive
22 information to the federal government when they sought heightened security
23 clearances in order to work on secret projects. And three other Plaintiffs have
24 completed SF 85, the very form at issue here.

25 Plaintiffs ask this Court to invalidate the federal government's background
26 check—a result which would have far-reaching implications—on the grounds that it
27 violates their constitutional right to privacy. But a number of cases not cited by
28 Plaintiffs have scrutinized the use of background checks and have found them to be

1 constitutional. Plaintiffs rely on several inapplicable cases involving forced drug
2 testing, but there is no forced search or seizure of any of the Plaintiffs here.

3 Plaintiffs' request for preliminary injunctive relief against Caltech fails for
4 several reasons:

5 *First*, Plaintiffs cannot demonstrate a likelihood of success against Caltech on
6 their Privacy Act claim. The Privacy Act only applies to federal government
7 agencies, and Caltech is not a federal government agency.

8 *Second*, Caltech is a private entity, and thus cannot be liable for any
9 constitutional violation alleged by Plaintiffs here, even assuming the government
10 actually violated some constitutional right. Caltech did not create the badge-issuance
11 process at issue here, Caltech does not conduct any background checks on any
12 individuals, and Caltech does not determine who receives a badge allowing access to
13 JPL.

14 *Third*, there is no constitutional case or controversy because Plaintiffs' claimed
15 injuries are hypothetical or conjectural. No one has asked Plaintiffs to provide their
16 most sensitive, private information relating to parenting decisions or sensitive medical
17 conditions, and no such information has been disclosed publicly.

18 *Fourth*, Plaintiffs cannot prevail on their 14th Amendment claim. This
19 amendment applies only to the states, and neither NASA nor Caltech is a state.
20 Similarly, Plaintiffs' 4th Amendment claim fails because the 4th Amendment restricts
21 searches and seizures by the federal government and the background check here is
22 neither a search nor a seizure.

23 *Fifth*, Plaintiffs attempt to assert an "informational" right of privacy that the
24 courts have narrowly recognized, primarily in cases involving forced disclosure of
25 highly personal medical information, or personal decisions regarding abortions or
26 birth control. Courts are skeptical about expanding that right beyond those narrow
27 circumstances, and no circuit court has done so in any case involving a background
28 check.

1 missions JPL handles. *Id.* It is therefore important for NASA to investigate the
2 background of those with unescorted privileges, even if those people will not have
3 access inside the sensitive facilities themselves.

4 **Heightened Security Requirements For Federally-Owned Facilities**

5 On August 27, 2004, the President of the United States issued Homeland
6 Security Presidential Directive 12 (“HSPD 12”). *See* Aden Decl. ¶ 9. Thereafter, the
7 Department of Commerce published Federal Information Processing Standards
8 Publication No. 201-1 (“FIPS 201-1”), which set forth a standard for personal identity
9 verification of federal employees and contractors. *Id.* To ensure compliance with
10 HSPD 12 and FIPS 201-1, NASA issued Procurement Information Circular 06-01,
11 which set forth requirements for contractor personnel working at JPL and other
12 NASA-related facilities to apply for and obtain uniform security access badges. *Id.*

13 **The Badge Issuance Process**

14 Under its contract with NASA, Caltech is required to comply with certain
15 government policies, including executive orders of the President. *See* Proia Decl. ¶ 5.
16 The contract also allows NASA to unilaterally modify the contract when exigent
17 circumstances exist. *Id.* With respect to the new badge issuance procedures, NASA
18 invoked the “exigent circumstances” provision of the contract and mandated JPL to
19 “immediately comply” with the new procedures set forth in PIC 06-01. *See* Proia
20 Decl. ¶¶ 6-10.

21 NASA created the processes required to obtain an access badge to NASA
22 facilities, but the bulk of the process is completed by the federal government’s Office
23 of Personnel Management or “OPM.” JPL has no control over: (1) the background
24 investigation required to obtain a badge, or (2) whether an individual will be approved
25 to receive a badge. *See* Aden Decl. ¶ 10.

26 Although the badge-issuance process is not JPL’s, JPL has regularly
27 communicated with its personnel regarding the steps they were required to take to
28 obtain a badge. On February 22, 2007, JPL advised all personnel that they would

1 have to obtain a new identification badge, which would “require [] significant changes
2 in the issuance of badges.” *See* Aden Decl. ¶ 12, Ex.3 thereto. On March 28, 2007,
3 JPL sent an e-mail to all personnel advising them of the requirements for obtaining a
4 new badge, including the need to complete a background investigation. *Id.*, Ex. 4.
5 JPL also posted on its internal website a chart which provided an overview of the
6 process. *Id.*, Ex. 5.

7 Before any applicant could apply for a badge, JPL had to make an initial
8 determination about the “risk classification” appropriate for any particular job. *See*
9 Aden Decl. ¶ 13. As requested by the government, JPL applied the criteria developed
10 by the federal government to determine which jobs should be classified as having low,
11 moderate, or high risk. *See* Hart Decl. ¶ 6. A very high percentage of those needing
12 badges in order to access JPL’s facilities have a “low” risk classification, which
13 results in the least intrusive background check available. *Id.* ¶ 8. Each of the
14 Plaintiffs in this case was classified as “low” risk.

15 Applicants for badges begin the application process on the federal government
16 Office of Personnel Management’s secure online system called “e-QIP,” which is
17 located at <http://www.opm.gov/e-qip/>. *See* Aden Decl. ¶ 15. Applicants cannot pre-
18 apply for clearance and can only access the e-QIP website to start the application
19 process when they are “invited to do so by an appropriate official at their sponsoring
20 agency.” *See* <http://www.opm.gov/e-qip/>. Even though JPL is not a federal agency,
21 NASA has delegated to JPL the ministerial task of serving as the “sponsoring agency”
22 because JPL was the only entity with knowledge of the identity of the employees who
23 needed access to the facility. *See* Aden Decl. ¶ 14. JPL’s Office of Protective
24 Services, therefore, sent out e-mail notices to various personnel on a rolling basis
25 notifying them when they could begin the application process on e-QIP. *Id.*

26 When applicants log on to the e-QIP system, they provide the requested
27 information directly to the federal government—not to JPL. *Id.* ¶ 16. Applicants have
28 10 days from the receipt of the initiation e-mail to complete the form.

1 The primary form that applicants are required to complete is Standard Form 85
2 (or “SF 85”), which is a standard form the federal government requires for those
3 seeking employment in low-risk positions with the government. *See* Aden Decl. ¶ 16.
4 JPL did not create SF 85, nor did JPL select SF 85 as the form to use for these
5 purposes. The applicants complete SF 85 on the secure e-QIP website. *Id.*¹

6 SF 85 contains a five-page questionnaire, which asks 14 different questions.
7 *See* Compl., Ex. 1; Aden Decl. ¶ 17. SF 85 also includes an Authorization for Release
8 of Information (“Authorization”). The Authorization states that any information
9 disclosed in response to the Authorization “is for official use by the Federal
10 Government only for the purposes provided in this Standard Form 85, and may be
11 redisclosed by the Government only as authorized by law.” *See* Compl., Ex.1. JPL
12 has specifically advised its personnel that the Authorization does not allow the
13 government to access medical or private financial records. *See* Aden Decl. ¶ 21.

14 After the applicant completes SF 85 in the e-QIP system, an authorized
15 individual in JPL’s OPS department is given access to the form to “approve” it. *See*
16 Aden Decl. ¶ 23. In this context, to “approve” the form simply means that someone
17 has reviewed the form for completeness, *i.e.* someone has confirmed that the applicant
18 provided all of the information requested in the form. *Id.* The approvers do not
19 disclose any information contained on the form to anyone else and no one at JPL takes
20 any steps to investigate or confirm the accuracy of any of the information provided on
21 SF 85. JPL has hired 22 contractors—who have at least secret clearances and are
22 approved by OPM—to fulfill this “approver” function. *Id.*

23 Once the approver confirms that an applicant’s SF 85 is complete, the
24 completed form is sent to the government’s OPM for further processing. *See* Aden
25 Decl. ¶ 23. Because all of the data is entered electronically by the applicants, it is

26 ¹ Plaintiffs’ assertion that Caltech faculty are not required to obtain a badge is
27 false. Caltech faculty must go through the same process as Plaintiffs. *See* Aden
28 Decl. ¶ 30.

1 maintained in OPM's e-QIP system. *Id.* ¶ 24. Although some of the approvers may
2 print the forms as part of their review process, once the forms have been approved, all
3 hard copies of the completed SF 85 are shredded. JPL maintains no record of the data
4 contained within SF 85. *Id.*

5 Once the completed SF 85s have been submitted and approved, OPM and
6 NASA "adjudicate" the application. JPL plays no role and has no say in the
7 adjudication process. *See* Aden Decl. ¶ 25. After OPM and NASA adjudicate an
8 application, the individuals are notified by NASA if they did not pass. Those who do
9 not pass can appeal the decision with NASA; JPL plays no role and has no say in the
10 appeal process. In fact, JPL is not even advised of the reasons why any applicant is
11 denied a badge, and JPL cannot participate in the decision-making process or appeal.
12 *Id.* ¶¶ 25-27.

13 **Status of the Badge Issuance Process at JPL**

14 Since April 2007, more than 4,100 individuals at JPL have submitted their SF
15 85s to the government. *See* Aden Decl. ¶ 28. Over 57,000 individuals are subject to
16 the new badge-issuance requirements at all NASA facilities. As of August 31, 2007,
17 over 46,000 of those individuals have applied for their badges. *Id.*

18 Of the named Plaintiffs in this case, three (Julia Bell, Amy Hale, and Peter
19 Shames) have already provided the information requested in SF 85 to the government.
20 *Id.* ¶ 29. Moreover, a number of the named Plaintiffs in this case have held security
21 clearances in the past, which means that these individuals underwent a far more
22 extensive background check than what is being asked of them here. *Id.* ¶ 31. To
23 receive a security clearance today, an applicant would complete, at a minimum,
24 Standard Form 85P, or Standard Form 86, both of which require more information
25 spanning more time than that required on SF 85. *Id.* ¶ 31; *id.* Ex. 6 (chart
26 summarizing differences between SF 85, SF 85P, and SF 86).

1 **Turnover of Personnel at JPL**

2 Like any large organization, JPL experiences turnover for a variety of reasons
3 and is accustomed to replacing various employees who change positions or leave. For
4 example, in 2006, approximately 178 employees were laid off, 61 retired, 155 left
5 voluntarily, and 15 left JPL for other reasons. *See* Hart Decl. ¶ 9. In total, more than
6 400 employees left JPL just last year. In addition, JPL received more than 5,300
7 inquiries for approximately 600 job openings last year; in other words, almost 10
8 qualified applications for every job. *Id.* While Caltech values its talented and
9 exceptional employees and works hard to retain them, Caltech has always been able to
10 find qualified individuals to take their place with minimal disruption to the important
11 projects that JPL handles. *Id.* JPL employees who choose not to apply for the
12 federally-required access badge will be considered to have a voluntarily resigned from
13 their employment. *Id.*

14 **ARGUMENT**

15 To obtain preliminary injunctive relief, a plaintiff must demonstrate: (1) a
16 combination of probable success on the merits and the possibility of irreparable injury;
17 or (2) the existence of serious questions going to the merits and a balance of hardships
18 tipping sharply in the moving party's favor. *See GoTo.com, Inc. v. Walt Disney Co.*,
19 202 F.3d 1199, 1204-05 (9th Cir. 2000). As detailed below, Plaintiffs have not
20 demonstrated likelihood of success or even a serious question on the merits or
21 irreparable harm.

22 **I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON ANY OF THEIR**
23 **CLAIMS AGAINST CALTECH.**

24 In their moving papers, Plaintiffs claim Caltech violated the Privacy Act, the
25 Administrative Procedures Act, the 14th Amendment and the 4th Amendment. They
26 are not likely to succeed on any of these claims.²

27 _____
28 ² While Plaintiffs plead a cause of action under the California Constitution in their
(Continued...)

1 **A. Neither the Privacy Act nor the Administrative Procedures Act**
2 **Applies to Caltech Because Caltech is a Private Entity.**

3 Plaintiffs' fourth cause of action alleges that Caltech violated the Privacy Act.
4 *See* Compl. 21. But the Privacy Act, which is codified at 5 U.S.C. § 552a, applies
5 only to an "agency." *See* 5 U.S.C. § 552(f) ("agency" is defined as executive
6 departments of the federal government). Courts have refused to expand the Privacy
7 Act to apply to private entities like Caltech. *See Unt v. Aerospace Corp.*, 765 F.2d
8 1440, 1447 (9th Cir. 1985) (private not-for-profit corporation doing business with the
9 federal government not an agency subject to suit under the Privacy Act); *Dong v.*
10 *Smithsonian Inst.*, 125 F.3d. 877, 879 (D.C. Cir. 1997) (Smithsonian not an agency
11 under the Privacy Act). Plaintiffs present no argument that the Privacy Act should
12 apply to Caltech. Accordingly, this claim cannot serve as the basis for issuing a
13 preliminary injunction here.

14 Plaintiffs did not plead an Administrative Procedures Act claim against Caltech.
15 *See* Compl. 5. They do, however, group all "defendants" together in their brief,
16 suggesting they may intend to bring this claim against Caltech. But the
17 Administrative Procedure Act ("APA") only applies to government agencies—not
18 private universities like Caltech. *See* 5 U.S.C. §§ 701(b)(1), 702 (the APA defines
19 "agency" as "each authority of the Government of the United States. . . ." and the Act
20 only allows judicial review for persons "suffering legal wrong because of agency
21 action, or adversely affected or aggrieved by agency action. . . .");³ *see also Western*

22
23 complaint, they do not rely on or even mention it in their motion for a
24 preliminary injunction. Plaintiffs cannot raise arguments for the first time in
25 their reply that were not include in their opening brief. *See U.S. v. Romm*, 455
26 F.3d 990, 997 (9th Cir. 2006) ("arguments not raised by a party in its opening
27 brief are deemed waived."); *see also U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d
28 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new
29 facts or different legal arguments in the reply brief than those presented in the
30 moving papers.").

31 ³ All internal citations and quotations are omitted in all citations throughout this
32 brief unless otherwise noted.

1 *State Univ. v. Am. Bar Ass'n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal. 2004) (“By its
2 own language, the APA does not extend to an entity that is not a federal agency. . . .”).

3 Thus, two of Plaintiffs’ four causes of action against Caltech fail as a matter of
4 law because the statutes they are based on do not apply to private entities like Caltech.
5 Accordingly, those claims cannot support the preliminary injunction Plaintiffs seek.

6 **B. Caltech Is A Private Entity and Is Not Engaging In Any Alleged**
7 **“Government” Conduct That Violates the Constitution.**

8 Neither the 4th Amendment nor the 14th Amendment applies to private entities.
9 *See, e.g., Flagg Bros., v. Brooks*, 436 U.S. 149, 156 (1978) (constitutional rights can
10 only be infringed by governments or those acting under the color of law).⁴ Plaintiffs
11 do not even attempt to explain how these constitutional provisions apply to a private
12 entity like Caltech. *See* Compl. ¶ 33 (“[Caltech] is a non-profit educational
13 institution.”).

14 The only exception to this bedrock principle is when a private entity is found to
15 be a “state actor.” The Supreme Court instructs that there should be “careful
16 adherence” to the state actor requirement in order to maintain “an area of individual
17 freedom by limiting the reach of federal law and federal judicial power.” *Lugar v.*
18 *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Indeed, courts start with the
19 “presumption that private conduct does not constitute governmental action.” *Sutton v.*
20 *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). “In order for
21 private conduct to constitute governmental action, ‘something more’ must be present.”
22 *Id.* (citing *Lugar*, 457 U.S. at 939).

23 Caltech does not fall within the exception. Caltech is a private contractor,
24 subject to federal regulations. It engages in no conduct implicating any constitutional
25

26
27 ⁴ *See also* discussion at sections I. D.(i) and I. D.(ii) explaining that the Fourteenth
28 Amendment only applies to the states, and that the Fourth Amendment restricts
searches and seizures by the federal government.

1 inquiry, and Plaintiffs point to none. Rather, Plaintiffs provide specific allegations
2 relating to their constitutional claims only with respect to *government* entities:

- 3 • the President signed the Homeland Security Presidential Directive 12
4 (HSPD-12) applicable to all Executive Branch departments and agencies;
- 5 • the US Department of Commerce promulgated the “Personal Identity
6 Verification” (“PIV”) standard, specifying the background investigation will
7 be a “National Agency Check with Inquiries” which requires completion of
8 SF 85;
- 9 • NASA issued Procurement Information Circular 06-01 establishing the new
10 policy for creation and issuance of federal credentials at NASA and
11 instituted a new identification badge known as the PIV or PIV II;
- 12 • A federal employee will perform an adjudication of employees’ suitability if
13 the badge issuance process yields unfavorable information; and
- 14 • NASA requires the implementation of a background investigation and
15 release of information.

16 There is not a sufficient nexus between Caltech and the federal government’s
17 actions with respect to HSPD-12 to find Caltech to be a state actor here. Caltech’s
18 only connection is that it operates JPL pursuant to a contract with NASA and, by law
19 and by contract, must abide by NASA’s required security measures for entering the
20 NASA facility. All of the alleged unconstitutional conduct—namely the creation,
21 implementation, and enforcement of the background check and records release—is
22 government conduct.

23 In *Sutton*, the Ninth Circuit held that a hospital’s decision not to hire the
24 plaintiff when he refused to provide his social security number, as required by federal
25 law, did not make the hospital a state actor. *See Sutton*, 192 F.3d at 843.
26 Governmental compulsion in the form of a generally applicable law, without more,
27 does not make a private entity a governmental actor. *Id.* at 841. Rather, a plaintiff
28 must show “some other nexus . . . [t]ypically . . . participation by the state in an action
ostensibly taken by the private entity, through conspiratorial agreement, official
cooperation with the private entity to achieve the private entity’s goal, or enforcement
and ratification of the private entity’s chosen action.” *Id.*

1 Caltech's ministerial conduct relating to the implementation of the badge
2 issuance process is like the hospital's conduct in *Sutton*. For instance, Caltech
3 contractors verify that the SF 85s are completed, but they do not conduct any
4 substantive review of the information in those forms. *See* Aden Decl. ¶ 23. This type
5 of passive participation does not turn Caltech into a state actor. Nor is Caltech a state
6 actor simply because it operates JPL pursuant to federal regulations or because it
7 receives federal funding. "Acts of such private contractors do not become acts of the
8 government by reason of their significant or even total engagement in performing
9 public contracts." *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Indeed,
10 Caltech's contract with NASA explicitly states that "[n]otwithstanding the special
11 relationship created by this sponsoring agreement, the California Institute of
12 Technology is acting as a contractor and not as an agent of the Government." *See*
13 Proia Decl. ¶ 3.

14 There are also potentially serious repercussions if this Court were to require a
15 private entity like Caltech to defend the constitutionality of a government-ordered
16 program. To do so would be to "convert every employer...into a governmental actor
17 every time it complies with a presumptively valid, generally applicable law." *Sutton*,
18 192 F.3d at 838. If that were the law, Caltech would be forced to "defend those laws
19 and pay any consequent damages, even though [it] bear[s] no real responsibility for
20 the violation of rights arising from the enactment of the laws." *Id.* at 838-39; *see also*
21 *Lugar*, 457 U.S. at 937 (cautioning that if courts do not enforce the state actor nexus
22 "private parties could face constitutional litigation whenever they seek to rely on some
23 state rule governing their interactions with the community surrounding them.")).
24 Private actors are entitled to rely on the presumptive validity of laws and regulations.
25 To hold a private party responsible for a law or regulation that it did not create
26 broadens the Constitution far beyond its intended limit.⁵

27
28 ⁵ This result also makes sense when one imagines the broad array of private
(Continued...)

